STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

NICHOLAS C. PIRRERA :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the
Tax Law for the Period March 1, 1993 through :
February 28, 1998.

In the Matter of the Petition :

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NICHOLAS PIRRERA, JR. ASSOCIATES, INC. :

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the
Tax Law for the Period March 1, 1993 through :
February 28, 1998.

DETERMINATION
DTA NOS. 819693
AND 819694

Petitioner Nicholas C. Pirrera, 12 Smith Point, Shirley, New York 11967, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1993 through February 28, 1998.

Petitioner Nicholas Pirrera, Jr. Associates, Inc., 1036A Middle Country Road, Selden, New York 11784, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1993 through February 28, 1998.

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 24, 2004 at 10:30 A.M., with all briefs submitted by October 5, 2004, which date began the six-month period for the issuance of this determination. Petitioners appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioners have shown error in either the audit method or result.

II. Whether fraud penalties imposed pursuant to Tax Law § 1145(a)(2) should be sustained.

FINDINGS OF FACT

1. On August 12, 2002, following an audit, the Division of Taxation ("Division") issued to petitioner Nicholas Pirrera, Jr. Associates, Inc. ("the corporation") a Notice of Determination which assessed $353,599.95 in additional sales and use taxes due, plus interest and fraud penalty pursuant to Tax Law § 1145(a)(2), for the period March 1, 1993 through February 28, 1998.

2. On September 3, 2002, the Division issued to petitioner Nicholas C. Pirrera[1] a Notice of Determination which also assessed $353,599.95 in additional sales and use taxes due, plus interest and fraud penalty pursuant to Tax Law § 1145(a)(2), for the period March 1, 1993 through February 28, 1998. The notice informed this petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Nicholas Pirrera, Jr. Associates, Inc. and therefore personally liable for the sales and use taxes due from the corporation.

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[1] This determination shall refer to petitioner Nicholas C. Pirrera as "petitioner" and petitioner Nicholas Pirrera, Jr. Associates, Inc. as "the corporation" (unless otherwise indicated).

3. The corporation was in the business of selling used cars under the name Car Keepers Auto Sales and was located in Selden, Suffolk County, New York. Petitioner was the sole officer and shareholder of the corporation. He regularly signed sales tax returns and checks in payment of sales tax for the corporation. He did not dispute his status as a person responsible for the collection of sales tax for the corporation during the period at issue.

4. The audit herein began with the Division's service of a subpoena dated October 13, 1998 upon the corporation. The subpoena demanded the production of certain documents and records for the period "January 1, 1993 - Present." Among other documents, the subpoena specifically demanded the production of "all sales journals or ledgers," "all customer/dealer folders and information contained therein," and "all customer/dealer finance folders and information contained therein."

5. In response to the subpoena, the corporation provided the Division with all sales records in its possession. Of particular significance to the audit, the corporation provided all 698 sales invoices in its possession for the period under review.

6. On audit, the Division reviewed in detail each of the 698 sales invoices provided by the corporation. All such invoices were for retail sales and none indicated a trade-in. Additionally, all of the invoices indicated the sale of a service contract to the purchaser. Upon review of the invoices, the Division totaled sales tax collected and calculated sales tax due with respect to such transactions. The invoices indicated that petitioner collected $830,671.60 in sales tax on these transactions. The Division determined that $818,963.30 in sales tax was due on these sales. The difference between the tax collected and tax due amounts is the result of charging sales tax at an

erroneous 8.5 percent rate rather than the applicable 8.25 percent rate for some sales. The Division assessed tax herein based on the lower sales tax due amount.[2]

7. The corporation reported and paid $530,908.89 in sales tax for the audit period. After a small adjustment for vendor collection credit, the difference between sales tax due as determined by the Division upon review of the invoices and sales tax reported and paid by the corporation amounts to $287,187.32. Petitioners do not dispute this portion of the sales tax assessment.

8. During the course of its investigation and audit, the Division obtained from a confidential informant a document referred to herein as the "cash report," so designated because the word "CASH" is captioned at the top of each page of the report. The cash report is a 14-page computer printout of 671 sales made by the corporation from September 23, 1994 through October 2, 1998. With respect to each such sale, the cash report lists the date of sale, name of purchaser, stock number, vehicle year and model, amount financed, cash down, and sales tax. Most of the sales listed on the cash report are also included among the list of invoice sales contained in the record; approximately 200 of the sales listed on the cash report, however, are not included among the list of invoice sales.

9. In January 2000, the Division reviewed certain completed MV-50 books obtained from the New York State Department of Motor Vehicles ("DMV"). As a car dealer, the corporation filed an MV-50 form (Retail Certificate of Sale) with DMV for every motor vehicle sale. The Division's review of such books revealed 41 sales of motor vehicles by the corporation which were not among the invoices reviewed by the Division on audit, but which were included among the sales listed on the cash report. Forty of these sales occurred from April 13, 1996 through

[2] It is noted that the Division's auditor incorrectly testified that the erroneous tax rate *increased* the deficiency by approximately $11,000.00.

November 22, 1996; one sale occurred in May 1997. On audit, the Division determined that these 41 sales were additional sales properly subject to tax and calculated additional tax due based upon information in the cash report. Additional tax determined on audit with respect to these 41 sales totaled $50,021.97.

10. Information derived from the MV-50 books was consistent with the information on the cash report with respect to name of purchaser and make and model of car for each of these 41 sales. The sales tax assessed with respect to each of these 41 sales was identical to the sales tax amounts indicated on the cash report for 34 of the sales. With respect to the remaining seven sales, the amount assessed exceeded the amount indicated by the cash report by a total of $280.45. There is no explanation in the record for this difference.

11. Among these 41 sales were 2 sales to Connecticut purchasers and one sale to a New Jersey purchaser. The cash report indicates that the corporation charged sales tax on these transactions.

12. As noted, 40 of the 41 sales which generated this MV-50/cash report portion of the assessment occurred during the period April 13, 1996 through November 23, 1996. During this same period, the cash report lists 141 other sales that are also contained in the list of invoice sales. With respect to 139 of such sales, the sales tax due as listed on the invoices and sales tax as listed on the cash report are identical. There are small differences in sales tax with respect to the remaining 2 of these 141 sales. The information on the cash report with respect to date of sale, purchaser's name, and vehicle year and model is consistent with the information contained on the invoices with respect to all 141 of these sales.

13. The Division referred this matter to the Suffolk County District Attorney's office for possible criminal prosecution. Petitioner was arraigned in Nassau County District Court and

charged with grand larceny in the second degree, a felony, in violation of Penal Law §155.40, based upon his collection of and failure to remit sales taxes from sales of cars sold by the corporation during the period March 1, 1993 through February 28, 1998.

14. On December 14, 2001, pursuant to and in connection with an application to convert the felony complaint to a misdemeanor information, petitioner pled guilty to petit larceny, a misdemeanor, in violation of Penal Law §155.25. In his plea allocution, petitioner admitted that, through his business, Car Keepers Auto Sales, he knowingly and intentionally stole in excess of $50,000.00 from the State of New York by collecting and failing to remit sales tax funds from sales of cars sold by his business during the period March 1, 1993 through February 28, 1998. Petitioner was sentenced to three years probation, 280 hours of community service, and was ordered to make restitution of $250,000.00. Petitioner paid the restitution as ordered by the criminal court and the Division has credited petitioner with such payment.

15. In two quarters of the audit period, the periods ended November 30, 1995 and February 29, 1996, the tax reported exceeded the tax found due on audit. Accordingly, no additional sales tax was assessed for these two quarters. The Division has credited petitioners with a refund offset in the amount of the overpayment ($16,390.66) and applied that credit as a payment against the assessment herein. This refund offset accounts for the difference between the amount of tax assessed in the notices of determination ($353,599.95) and the net amount of additional tax found due on audit ($337,209.29).

16. During at least a portion of the period at issue one Theodore Kipp was employed by the corporation. The date when Mr. Kipp became an employee of the corporation is not in the record.

17. The corporation was previously subject to a sales tax audit for the period September 1, 1986 through February 28, 1989. This prior audit resulted in an additional tax liability of $3,374.10.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner does not contest the $287,187.32 portion of the assessment based upon the Division's detailed review of its invoices. Petitioner does contest the $50,021.97 portion of the assessment drawn from the cash report and the MV-50's obtained from the Department of Motor Vehicles. Petitioner contends that the cash report was the creation of the confidential informant, a "back stabber" who created the cash report to show to the Division and thereby "bury" petitioner. Petitioner contended that the confidential informant was Mr. Kipp, his former employee.[3] According to petitioner, Mr. Kipp had a relationship with petitioner's ex-wife, and he created sales tax problems for petitioner in order to put petitioner at a disadvantage in a child custody proceeding. Petitioner thus asserts that the portion of the assessment based upon the cash report and the MV-50's should be cancelled.

19. As the sole officer and shareholder of the corporation, petitioner Nicholas C. Pirrera does not contest his status as a responsible officer. Petitioner does, however, contest the imposition of fraud penalty. He asserts that he bought and sold cars for the business and was not involved in bookkeeping or maintenance of books and records. He thus did not knowingly underreport sales taxes and did not possess the requisite intent for the imposition of the fraud penalty.

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[3] The Division did not acknowledge petitioner's claim and did not reveal the confidential informant's identity.

20. Petitioner explained his guilty plea to petit larceny as an effort to put the matter behind him and also as a way to put himself in a better position in the child custody proceeding with his ex-wife. Petitioner claimed that the admissions he made during the plea allocution were untruthful.

21. The Division contends that petitioner failed to prove any error in the amount of tax assessed. The Division also contends that, as a result of petitioner's guilty plea, he is estopped from contesting the civil fraud penalty herein. If estoppel is not applicable, the Division contends that it met its burden of proving that fraud penalty was properly imposed under Tax Law § 1145(a)(2). If fraud penalty is not sustained, the Division asserts that the imposition of negligence penalty under Tax Law § 1145(a)(1) is warranted.

CONCLUSIONS OF LAW

A. With respect to the $50,021.97 portion of the assessment drawn from the cash report and the MV-50's, it is well established that where records are found to be incomplete or inaccurate, external indices may be used to determine tax (***Matter of Urban Liquors v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138). Here, the MV-50's and the cash report establish that petitioner's sales invoices for the audit period were incomplete. Under such circumstances, the Division's use of the MV-50's to determine taxable sales was reasonable (***see***, ***Matter of Anthony***, Tax Appeals Tribunal, November 30, 1995; ***Matter of Pasquarella***, Tax Appeals Tribunal, July 18, 1991). Additionally, the Division's use of the cash report to determine the sales price and sales tax due for each sale as evidenced by the MV-50's was also proper (***id***.).

B. Where, as here, the Division's use of external indices to determine additional tax due is appropriate, the burden of proof lies with the taxpayer to show by clear and convincing evidence that the audit method was unreasonable or that the results were unreasonably inaccurate (***see***,

Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679). Petitioner's evidence consisted solely of the testimony of Nicholas C. Pirrera. Such testimony is clearly insufficient to establish error in either the audit method or result.

Petitioner's argument that the portion of the assessment based upon the cash report and the MV-50's should be cancelled rests upon the contention that the cash report was a sham created by an employee seeking to create sales tax problems. This contention is rejected. Although the precise origin of the cash report is unclear from the record, it is clear that the invoices and MV-50's were its sources. Information on the cash report as to date of sale, name of purchaser, and make or model of vehicle is consistent with similar information on the invoices and MV-50's with respect to the approximately 482 sales for which a comparison can be made.[4] As to the validity of the sales prices and tax due amounts on the cash report, as noted herein, a comparison of 141 sales listed in both the cash report and the invoice list for an approximately 7-month period reveals that, for 139 of such sales, the sales tax due as listed on the invoices and sales tax as listed on the cash report are identical (***see***, Finding of Fact "12"). The credibility and accuracy of the cash report is thus established by corroboration with the list of invoices and the MV-50's.

In the context of an audit of a car dealer the Tax Appeals Tribunal has held that the use of National Automobile Dealers Association ("NADA") book values with MV-50's to determine additional tax due is reasonable (***see***, ***Matter of Anthony***, ***supra***; ***Matter of Pasquarella***, ***supra***). Here, the Division's use of the cash report, a demonstrably credible and accurate document, with

[4] As noted in Finding of Fact "8," the cash report listed 641 sales, approximately 200 of which were not included in the list of invoice sales. Of those 200 sales, 41were corroborated by the MV-50's, hence the 482 sales referred to above (641−200+41=482).

MV-50's to determine additional tax due is a significantly stronger audit method than that employed in either ***Anthony*** or ***Pasquarella***.

During the course of the hearing, petitioner claimed that the Division erroneously assessed tax on out-of-state sales. However, the cash report indicates that petitioner collected tax on the only three sales in the record identified as sales to out-of-state purchasers (***see***, Finding of Fact "11"). The Tax Law requires that all amounts collected as tax must be remitted to the State (***see***, Tax Law § 1137[a]). Petitioner offered no evidence to show that the cash report was in error and that sales tax was not collected on such sales. Accordingly, the Division properly assessed tax on the three sales to apparent out-of-state purchasers.

At hearing petitioner also claimed that one-fourth of his sales involved a trade-in and that the Division failed to account for such trade-ins in its audit. Petitioner, however, offered no proof of such trade-ins or any explanation as to why none of the 698 invoices reviewed by the Division on audit indicated a trade-in. Petitioner thus has failed to established the existence of any specific trade-ins during the audit period.

Petitioner also questioned the amount of sales tax charged on the 41 cash report/MV-50 sales. As noted herein, for 34 of these sales, tax assessed was identical to the sales tax amounts indicated on the cash report. With respect to the remaining seven of these sales, there is a relatively small difference between the tax assessed and the tax indicated by the cash report (***see***, Finding of Fact "10"). As discussed above, the cash report is an accurate and credible document. The Division's use of the cash report was thus reasonable and the small difference between the cash report and the amount assessed for seven of these sales does not affect the credibility of the cash report. It is noted that petitioner offered no evidence to show that the tax assessed on these 41 sales was erroneous.

C. The subject notices of determination assess civil fraud penalties pursuant to Tax Law § 1145(a)(2). The burden of showing that the failure to pay tax occurred as a result of fraud rests with the Division (***Matter of Sener***, Tax Appeals Tribunal, May 5, 1988). While fraud is not defined in the statute, a finding of fraud requires the Division to show:

> clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing. (***Matter of Sener***, ***supra***, citing, ***Matter of Shutt***, State Tax Commn., July 13, 1982.)

D. The Division asserts that petitioner is collaterally estopped from contesting the fraud penalty by virtue of his guilty plea in the criminal proceeding to petit larceny. For the doctrine of estoppel to apply, petitioner must have had a fair opportunity to litigate the same issues during the prior proceeding. (***See***, ***Kuriansky v. Professional Care***, 158 AD2d 897, 551 NYS2d 695.) This means that:

> the party seeking the benefit of collateral estoppel (here, the State) has the burden of demonstrating the identity of the issues and the necessity of their having been decided, and the party opposing its use (here, petitioner [Sokol]) has the responsive burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. (***State of New York v. Sokol***, 113 F3d 303, 306 [2d Cir 1997][citations omitted].)

E. Petitioner pled guilty to petit larceny, a misdemeanor, in violation of Penal Law §155.25. In his plea allocution, petitioner admitted that, through his business, Car Keepers Auto Sales, he knowingly and intentionally stole in excess of $50,000.00 from the State of New York by collecting and failing to remit sales tax funds from sales of cars sold by his business during the period March 1, 1993 through February 28, 1998, i.e., the period at issue herein. Given the identity of issues between the civil fraud penalties assessed herein and the facts and circumstances of petitioner's guilty plea, petitioner is properly estopped from contesting the fraud penalty for the period at issue (***see***, ***Matter of DeFeo***, Tax Appeals Tribunal, April 22, 1999).

F. Even if estoppel were not applied, there is ample evidence in the record to establish fraud. Petitioner's guilty plea and admissions in his plea allocution are direct evidence that he knowingly and intentionally collected but did not remit sales taxes during the period at issue. Additionally, the record shows consistent and substantial underreporting throughout the entire audit period. Furthermore, approximately 85 percent of the $337,209.29 tax deficiency in this matter is directly established from petitioner's own invoices. Such evidence clearly and convincingly establishes that civil fraud penalties are properly imposed in this matter (***see***, ***Matter of Sona Appliances, Inc.,*** Tax Appeals Tribunal, March 16, 2000).

G. Petitioner's attempt to shift responsibility for the corporation's underreporting to his former employee, Mr. Kipp, is unconvincing. Petitioner's claim of ignorance of the corporation's consistent and substantial underreporting is countered not only by his guilty plea, but also by his status as sole shareholder and officer of the corporation and his signature on sales tax returns and checks in payment of sales taxes. Furthermore, petitioner's testimony regarding Mr. Kipp, which was uncorroborated by any other evidence in the record, was notably lacking in specifics. He could not even recall when he hired Mr. Kipp. Additionally, crucial to petitioner's claim that he was a victim of Mr. Kipp's machinations is his claim that the cash report was a sham created by Kipp to "bury" petitioner. As discussed above, however, the record establishes that the cash report is a credible and accurate document. Moreover, as noted above, the cash report accounts for only about 15 percent of the deficiency; petitioner's invoices account for the rest. Thus, to borrow petitioner's vernacular, he was "buried" by his own invoices, not the cash report. Petitioner's effort to explain his guilty plea is similarly unconvincing. Petitioner offered no explanation as to how his guilty plea to petit larceny would provide an advantage in his child custody proceeding. Moreover, petitioner's assertion that his statements during the plea allocution were untruthful cast significant doubt on his credibility in the instant matter.

Petitioner also cited the results of the prior audit (***see***, Finding of Fact "17"), which occurred, according to petitioner, before Mr. Kipp's employment, as evidence of a lack of intent to commit fraud during the period at issue. This argument, too, is unconvincing. The fact of an absence of fraud in a prior period is clearly insufficient to overcome the strong evidence of fraud herein as discussed above.

H. The petitions of Nicholas C. Pirrera and Nicholas Pirrera, Jr. Associates, Inc. are denied, and the notices of determination dated August 12, 2002 and September 3, 2002 are sustained.

DATED: Troy, New York
March 17, 2005

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE